MONTHLY UPDATE

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IF YOU THINK YOUR ASSETS ARE SAFE UPON DIVORCE BECAUSE YOU HAVE AN ANTENUPTIAL AGREEMENT IN PLACE, THINK AGAIN.

Prior to 11 May 2022 parties could freely enter into antenuptial contracts with the ease of mind knowing that their assets would be protected upon divorce. Then came a judgment handed down on 11 May 2022 and this changed… leaving lawyers and laymen alike in a complete state of disarray for what the future could hold as this created legal uncertainty in that, irrespective of a binding antenuptial agreement with the exclusion of the accrual system, a party can now be ordered to part with his assets in his own estate upon divorce despite such antenuptial agreement.

BACKGROUND

Section 7(3)(a) of the Divorce Act 70 of 1979 ("Divorce Act") states that:

"A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded may, subject to the provisions of subsection (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party."

Before 1984 South Africa recognised only two marriage regimes, namely in community of property where couples shared all their assets and liabilities, and out of community of property where couples' assets and liabilities were separated.

Then came the enactment of the Matrimonial Property Act of 1984 (MPA) which introduced the accrual system where, upon the dissolution of a marriage concluded out of community of property, a spouse would be entitled to equally share in the growth of the other spouse's estate.

> *WITHOUT PACTA SUNT SERVANDA , THE LAW OF CONTRACT WOULD BE SUBJECT TO GROSS UNCERTAINTY BETWEEN THE CONTRACTING PARTIES*

RECENT CASE LAW

In the recent case of *Greyling v Minister of Home Affairs and others [2022] ZAGPPHC*, Mrs. Greyling got married in 1988, out of community of property with the exclusion of the accrual system which, in effect, would exclude her from sharing in her husband's wealth and in the growth of his estate upon divorce. Throughout her marriage she was a

homemaker who managed the household while her husband amassed a ton of wealth and rose to be a dominant farming magnate. Van Der Schyff J. declared Section 7(3)(a) of the Divorce Act unconstitutional and invalid as Section 7(3) of the Divorce Act only applied to marriages out of community of property entered into before the commencement of the MPA and not to those marriages entered into after the enactment of the MPA.

THE SANCTITY OF CONTRACTS

'If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.'

These words held in the judgment of W*ells v South African Alumenite Company* 1927 AD echo the enshrined principals we have come to know and hold as true and binding and that is element of the sanctity of contracts. The freedom to contract is a Constitutionally guaranteed right and our courts have continued to uphold the principle of *pacta sunt servanda* on numerous occasions. The judgment in the *Greyling case* has created some of uncertainty surrounding this principle and matrimonial contracts concluded out of community of property without accrual. In *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another 2009 (3) SA 78 (C) the court* held that *"... without this principle, the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties".*

Section 39(2) of the Constitution requires that the spirit, purport and objects of the Bill of Rights must be promoted when interpreting legislation, and when developing the common law or customary law.

In the recent case of *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd 2018 (2) SA 314 (SCA)*, the Supreme Court of Appeal a consideration was made by the court in determining whether the principles of fairness and ubuntu should be incorporated in the development of *pacta sunt servanda* in our contract law. In its judgment, the SCA relied on a careful and considered analysis of numerous judgments which dealt with the balancing of upholding the sanctity of contracts with the interests of public policy of promoting reasonableness and fairness specifically to contract terms which may be in contravention of the latter.

The SCA in the Mohamed case referred to the case of *Barkhuizen v Napier 2007 (5) SA 323 (CC),* where the Constitutional Court developed the two-stage public policy test stating that a contract must not only be objectively reasonable but also subjectively reasonable in the particular circumstances in order to be enforceable.

This approach was not considered in the *Greyling* case where the court merely responded to the concern regarding *pacta sunt servanda* with the fact that courts have been given discretion to intervene and override the principle in earlier judgments without engaging in the reasonings which the previous courts relied upon.

Mathopo J in the Mohamed case states that, *"The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy"*. The freedom to contract is entrenched in our Constitution as a right and in our contractual law which provides for parties who contract freely and voluntary to honour the obligations which they had agreed upon. To this end the courts need to apply a careful and considered approach before overriding the principles of *pacta sunt servanda* as to maintain certainty in our contract law and ensure that contracts and their underlying agreements and subsequent obligations remain effective.

CONCLUSION

While this matter might cause great legal uncertainty, it has been referred to the Constitutional Court for confirmation.

Should this judgment be upheld by the Constitutional Court, there could be a risk of parties finding the execution of an antenuptial agreement fruitless which, in turn, could leave the economically weaker party more vulnerable due to their partners being deterred from getting married in the first place as a result of uncertainties pertaining to their assets in the event of a divorce.